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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

No. 465.

JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and TRANSIT COMMISSION, State of New York,

Appellants,

against

BELT LINE RAILWAY CORPORATION.

BRIEF FOR APPELLANT, JOAB H. BANTON, AS DISTRICT ATTORNEY.

Statement of the Case

In order to avoid duplication by the appellants and to present the facts and arguments to this court in as brief a compass as possible, the subject matter has been divided between the appellants. In the main, this brief deals with the matter of valuation.

The statement and specification of errors set forth in the brief of the appellant Commission is adopted for the purpose of this brief. There need only be added here a statement as to the matter of valuation.

The appellant commission properly maintains that the transfer order was not confiscatory because the additional expense which would be im-

posed by a resumption of transfers would not exceed the additional revenue which would be derived from the transfer passengers attracted thereby (Commission Brief, p. 17).

If this Court should find that the revenue received from the incidental transfer service is in excess of the additional expenses involved, there is no need to consider the valuation of all of appellee's property and revenues and expenses relating thereto. If, however, this Court should find that the incidental transfer service is conducted at a loss, then the matter of the valuation of all of appellee's property and the revenue and expense relating thereto become of importance.

The appellee, it should be here noted, has insisted throughout, the test is not the showing of the transfer traffic, but that the test is the showing of the entire operation of the appellee, including the transfer traffic.

This appellant is in accord with the appellant Commission that if the revenue received from operation of the incidental service exceeds the expense there is no confiscation; likewise there may be no confiscation in the event of some pecuniary loss. There certainly is no confiscation if the entire operation is profitable. [Commission Brief, Point II especially, pp. 19-22].

After a series of adjustments, all relating to expenses and revenues connected with the transfer traffic, many of them speculative and conjectural, the Court below found that there was only a loss of $4,000 per annum on said traffic [R. p. 119].

There were two valuations offered by appellee. The first valuation attempted was that of the witness Madden. Madden had made a valuation in connection with the Bureau of Valuations of the appellant Commission for the purpose of ac-

quiring all of the surface, elevated and railway properties of the City, pursuant to Chapter 134 of the Laws of 1921 as amended by Chapter 355 Laws 1921 [R. p. 155]. Madden testified only as to the valuations of the appellee's property upon the reproduction cost new basis as of June 30, 1921, but was unable to segregate from all of that property of the appellee, that portion which was used and useful for the 59th Street line, which is the line involved in the order of October 29, 1912 [R. pp. 15-26]. Likewise, he was unable to make a similar segregation in this computation on other bases [R. pp. 194, 197, 199, 202, 218].

Objection was made on the ground that it did not appear that the valuation was placed on the property which the plaintiff owned [R. p. 157]. Mr. Madden's figures were the estimated cost to reproduce as stated, without depreciation [R. pp. 157, 160]. Madden gave his estimate of "the cost of bringing this property into first class operating condition" [R. p. 157].

Appellee never introduced estimates as to original cost or as to cost to reproduce at pre-war prices, although these were available [R. pp. 159, 160]. Appellee's counsel stated that these elements were not relevant or competent [R. p. 158]. These estimates are printed as part of the record [R. p. 374, fol. 578]. They were both considerably lower than the cost to reproduce new as of June 30, 1921.

The study made by the Bureau of Valuations, testified to by Madden, is contained in a bulky volume marked Exhibit BS, the pertinent portions of which are included in the record. The scope of the study and method pursued in arriving at the determinations are shown in the record [R. pp. 359-374]. Appellee has maintained

throughout that Exhibit BS is not in evidence and that therefore no figures were in evidence other than reproduction cost figures by Madden, as of June 30, 1921, and by appellee's employees, on part of the property, as of Jan., 1923. To this appellant, it does not seem to be of consequence whether the original cost figure and the 1910-1914 figure, set forth in Exhibit BS, but not testified to by Madden, is or is not in evidence, *in view of the fact that in neither case was there any weight or consideration given to either the original cost or the 1910-1914 figure.*

The attention of this Court is respectfully directed to what occurred when Exhibit BS was received.

The record shows the following [R. p. 191]:

> THE MASTER: "Had not that appraisal, better be marked for identification? (Discussion.)
>
> I suppose nobody disputes the fact that the book before us is an accurate replica or duplicate or whatever you might call the report to the Commission that has been spoken of. It does not make a particle of difference to my mind which party puts in an essential exhibit.
>
> This report made to the Commission, dated Feb. 15, 1922, is marked in evidence Exhibit BS.
>
> You can put as memoranda, in here so there will be no future difficulty that this is done at the suggestion and in fact at the insistence of the Special Master as convenient for himself when coming to read the testimony after the close of the case and is not considered as being put in by either side.
>
> This entire volume is coming to me before I decide the case.
>
> On the argument on my report, if it is desirable for any judge to see it, he will ask for it and if it need be presented, by agree-

ment of the parties, certain pages will be inserted in the record.

Mr. Fertig: Will your Honor permit me to state what, after careful thought, we have considered to be the wishes of counsel and so that I may not put mysef in a position that will jeopardize any of my rights? If your Honor will permit me to say to this witness: "Will you read into the record the various figures for the respective classes of property upon the basis of original cost that you used in reaching the figures that you put into the record," and then have the pages read into the record as his answer.

The Master: I should prefer the witness make his own answer to the question at the proper time.

Mr. Fertig: Your Honor, he would undoubtedly answer that these were the figures. There is no question about that.

The Master: I cannot see the slightest improvement of your suggestion over the one I have made, which seems to me to be entirely simple and with the statement which I have made on the record, certainly you are not prejudiced before any court as having put this in the record, and therefore bound by everything in it, which of course, you would not be in the Federal Court anyhow, I do not know what might happen to you in some State Court.

Mr. Fertig: I will note my exception, and we will go on.

The Master: Yes.

While Exhibit BS included in this record contained valuations upon other bases, to wit: original cost, and reproduction cost 1910-1914, the appellee did not offer, the witness Madden did not testify to and the Master did not consider or give any weight to (as will be more specifically shown later), any element other than reproduc-

tion cost as of June 30, 1921, which Madden testified was $2,859,754 [R. p. 157]. The said reproduction cost new as of June 30, 1921, was adopted by the Master as the valuation of appellee's property devoted to the transfer traffic, only deducting (in addition to a sum of $77,000, representing errors in inventory), a sum characterized as depreciation, but representing only the amount of money required to place in first-class operating condition.

Figures on the original cost and 1910-1914 bases above described as well as that testified to by Madden upon the June 30, 1921, basis, include property not used in rendering the transfer traffic service.

The figures on original cost and 1910-1914 bases, as shown in Exhibit BS, are as follows:

ORIGINAL COST BASIS.

Original Cost	$1,831,559	(R. p. 374, fol. 587)
*Depreciation, straight line basis	377,090	(R. p. 374, fol. 587)
Cost to place in first class condition	128,246	(R. p. 157)

REPRODUCTION COST 1910-1914.

Reproduction cost	$2,273,000	(R. p. 374, fol. 587)
*Depreciation, straight line basis	502,950	(R. p. 374, fol. 587)
Cost to place in first class condition	128,246	(R. p. 157)
Reproduction cost less depreciation	1,770,130	(R. p. 374, fol. 587)

It should be here noted that Madden testified that, in his opinion, the proper figure for valuation was that of original cost less the cost to place in first-class operating condition [R. p. 160]; that the Master took as the valuation of all appellee's property the reproduction cost as of June 30, 1921, as computed by Madden [R.

* These figures do not directly appear. They are, in each case, the difference between the estimates marked "Before depreciation" and "Less depreciation."

p. 163], and deducted a sum characterized as depreciation but which, in fact, was only the cost of making repairs.

While the Master deducted only the amount required to put into good operating condition, his questions evidenced a recognition of the distinction between the cost of making repairs and the accrued depreciation computed on the straight line basis, as shown by the following [R. p. 157]:

> By the Master: Q. 51. That is, in first class operating condition as a piece of property as old as it then was? A. That is correct.
>
> Q. 52. Instead of as a brand new piece of property? A. That is correct.
>
> Q. 53. Of course, it would be in first class working condition and still, after several years of wear, it would not be worth as much as it was when it was laid down first? That is, it would not have as long a life even though it were in first class condition, would it? A. Its life would be naturally affected.

A second valuation of appellee's property was attempted through the employees of the appellee upon the reproduction basis as of the time of the hearing before the Master, namely, about January, 1923 [R. p. 220]. This valuation, however, was not complete, covering only track and structures, but not including the car barn (land and building). The employees total figure for track and structure was $1,333,108, being the total of Ryder's figure $1,124,000 and Quinn's figure, $209,108 [R. p. 107]. The employees computed depreciation at $271,000, being computed upon a combination of the observed and straight line bases [R. p. 230]. To the track and structure

figure, was added $280,000 for overheads [R. p. 230], which the Master said "might be perhaps somewhat reduced" [R. p. 107], making a net valuation of $1,342,000 [R. p. 230] as of January, 1923 [R. p. 220].

While the Master discusses in his report the valuation figure given by the company's employees [R. p. 107], he relies in his computation of valuation only on the reproduction figures testified to by Madden [R. p. 109].

Ryder, appellee's employee, estimated the cost to reproduce the track and structures on 59th Street from First to Tenth Avenues, and south on Tenth Avenue to 54th Street [R. p. 222] and estimated the depreciation [R. p. 222]. Appellants objected that he was not sufficiently qualified to give an opinion [R. pp. 221, 222]. It appeared that his unit of prices were based on arbitrary assumptions [R. pp. 224-225], and his percentages for overheads on information from hearings, conversation and reading [R. p. 230]. Quinn, another of appellee's employees, estimated the cost to reproduce certain ducts and cables, and testified that there was no sensible depreciation on these [R. p. 226]. Quinn's inventory included many feet of duct and cable not used by plaintiff but actually used by other companies [R. pp. 254-255]. Neither one of these witnesses gave the actual cost of the property covered by them.

Neither the District Court nor the Master made any finding as to the "fair value" of the property. The Master took the cost to reproduce new [R. pp. 108-109] without any deduction for actual depreciation. The District Court merely adopted the Master's valuation [R. p. 119].

Aside from the testimony as to value already referred to, the only other evidence of value consisted of the price for which the property sold on foreclosure in 1912 [R. p. 105] and the amount of capitalization authorized in 1913 [R. pp. 105, 132-133], at times when the plaintiff owned nearly 19 miles more track than it does today [R. p. 182].

POINT I.

The determination of the court below was that the transfer traffic was confiscatory by reason of a loss amounting to only $4,000 for the fiscal year June 30, 1922; and this upon a series of computations of conjectural character. The burden of proof is upon appellee to prove confiscation beyond a reasonable doubt.

The brief of the appellant Commission considers in detail all of the adjustments in expenses and revenue resulting from the additional service rendered in the transfer traffic.

On the matter of increased revenues, it was estimated by the Court below that the restoration of transfers would hardly exceed upon the Master's calculation, the sum of $42,000 [R. p. 119]. The Master computed the increase in revenues to be $46,000 [R. pp. 101, 104].

As to operating expenses, that might be involved in furnishing this additional transfer service, the Master's estimate was an additional expense of $105,900 [R. p. 104], but the court below rejected this estimate and arrived at the amount of $46,000 [R. p. 119].

There is a wide divergence between the Master and the Court below on both revenues and operating expense. Slight changes in the assumptions, if made by the Court below would have converted the negligible loss of $4,000 to a profit.

This Court, in the cases involving fair return, has never set aside a rate as confiscatory where there was such a narrow margin based not upon undisputed evidence but upon hypothesis and conjecture. Even though this court should hold that all of the assumptions in computing operating expenses are warranted, it is submitted that the loss as found by the Court below is so negligible compared to the total traffic involved as not to justify a decree of confiscation.

A statute or any order made by a State authority pursuant to a State statute is presumed to be constitutional. The burden of proof is upon the appellee to prove the contrary beyond a reasonable doubt. This is so well settled as to require no discussion.

Wilcox v. *Consolidated Gas Co.*, 212 U. S. 19, 41;

Detroit United Railway v. *Detroit*, 248 U. S. 442;

City of Knoxville v. *Knoxville Water Co.*, 212 U. S. 8;

Minnesota Rate Cases, 230 U. S. 352, 499;

In re Young, 209 U. S. 123, 165;

Atkinson Ry. Co. v. *U. S.*, 232 U. S. 199, 221;

Lincoln Gas Co. v. *Lincoln*, 223 U. S. 357;

Des Moines Gas Co. v. *Des Moines,* 238 U. S. 153, 163;
Railroad Commissioners of Louisiana v. *Cumberland Tel. & Tel. Co.,* 212 U. S. 423;
Shepard v. *Northern Pacific R. R. Co.,* 184 Fed. Rep. 165;
Palatka Water Works Co. v. *Palatka,* 127 Fed. Rep. 161;
Sinking Fund Cases, 99 U. S. 700, 718;
Fletcher v. *Peck,* 6 Cranch (star page) 128;
Montana W. & S. R. Co. v. *Morley,* 194 Fed. Rep. 991.

In *City of Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 8, the statement of the Court is particularly pertinent:

> "Nevertheless the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. *Prentis* v. *Southern Railway Co.,* 211 U. S. 210; *Honolulu Transit Co.* v. *Hawaii,* 211 U. S. 282. There can be at this day no doubt on the one hand, that the courts on constitutional grounds may exercise the power of refusing to enforce legislation, nor on the other hand, that that power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact he invalidating facts must be proved to the satisfaction of the

court. In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though confirmed by the trial court."

POINT II.

Accepting the finding by the Court of a loss of $4,000 on the transfer service, there is a net return on all the operation of appellee of $161,200, which is 6.2% on the valuation found by the Master and not disturbed by the Court.

The Master in his conclusions used the revenues and expenses for the fiscal year ending June 30, 1922, as the basis for his computations (being entirely a non-transfer period [R. p. 100]) and gave the revenue $580,526.97 and operating expense as $415,327.07 leaving a return of $165,199.90 [R. p. 108]. The Court in dealing with the effect of restoring transfers found additional revenue of $42,000 and additional expense of $46,000 [R. p. 119] making a loss of $4,000. Deducting this sum of $4,000 from $165,199.90 [R. p. 108], the return on the entire operation as found by the Master, we have $161,199.90 as net return to apply to the fair value of the property. This is 6.2% on the value of the property $2,600,000 as found by the Master [R. p. 109] and left undisturbed by the Court [R. p. 119].

The Court below recognized that the result reached from the operation of the incidental transfer service is affected by the value of appellees property in calculating a reasonable re-

turn [R. p. 119, fol. 197]. But the Court made no application of the principle it laid down and thus overlooked the fact that in accordance with the principle there was a more than a fair return.

The value as found by the Master, and not disturbed by the Court, was on the basis of reproduction cost new as of June 30, 1921, as testified to by Madden [R. p. 109] and without proper deduction for depreciation. This was improper for the reasons below stated. But even upon this improper valuation there is a fair return.

POINT III.

The valuation found by the Master and accepted by the District Court was improper, because it was based solely on the cost to reproduce, giving no weight or consideration to original cost or any other element of value.

The only element of value which the Master had before him was the reproduction cost new given in the Madden testimony and that made by appellee's employees of only a part of the property. *The Master did not consider or give any weight to original cost or any other element of value.*

The Master discussed a figure that he assumed represented the original cost, but the reference was an erroneous one. He referred to the figure $803,450 [R. p. 106] instead of the figure $1,831,559 [R. opposite p. 374, fol. 587]. The original cost figure referred to by the Master represents *the original investment for the roadway and*

track items only [R. Exhibit BS following p. 376, marked 589] and not the whole property. The discussion of the Master in his report was to the effect that the original cost figure was obviously insufficient [R. p. 106]. Having taken an erroneous figure it was not difficult to show the absurdity of the "original cost" figure.

From this assumed original cost figure of all the appellee's property, to wit, $803,450, he deducted depreciation on the straight line basis as computed by Madden, to wit, $226,515, leaving a net value on the original cost basis of $576,935. He then proceeds to show the absurdity of such a figure, it being only $46,000 in excess of the value of the real estate (land only) of the appellee [R. p. 106]. In passing it should be noted that the Master uses $226,515 which is the estimated accrued depreciation and does not use as depreciation the lesser amount $128,246 to place in good condition.

This is the only reference in the long report of the Master to the original cost figure of existing property. The error of the Master in his reference to the wrong page for the figure was brought to the attention of the Court below without result.

The appellee in his brief below conceded that there is no figure for original cost in the case other than the amount $2,557,091.53, which it calls original cost but which in fact was the capital stock and funded debt [R. p. 105], authorized in 1913, at which time the appellee owned nearly 19 miles more track than it does today [R. p. 182].

See

San Diego Land and Town Co. v. *Jasper*, 189 U. S. 439, 443.

It requires no argument to show that the total of stock and bonds outstanding has no relation to the original cost of the property *now* used and useful. It is obvious from the record that whatever moneys may have been invested in appellee's property, covered by the securities and notes issued in 1913 and 1915 *that much property is no longer in existence*, the tracks of the east and west belt lines of the appellee having since been abandoned [R. p. 106], in addition to other property, as will be more fully discussed under the next point.

Under the well settled law laid down by this Court it was the duty of the appellee to submit proof of valuation on bases other than reproduction cost new. This it studiously refrained from doing [R. p. 158]. If, as appellee maintains, Exhibit BS is not in evidence and that reproduction cost new is the only figure in evidence, then assuredly the Master and the Court below did not have before them the elements required by the decisions. In order to fix a present fair value, it was not the duty of the appellants to assume appellee's burden and offer proof of value on other bases; particularly so when the respective appraisals made included property no longer in service, and also included property not devoted to use of the 59th Street Crosstown Line.

If Exhibit BS under the stipulation by which it was admitted, be in evidence, then notwithstanding the availability for consideration of the value of appellee's property on the original cost basis and the 1910-1914 basis, no such elements were considered or given any weight. The Master deduced his value directly from the reproduction new cost 1921 basis as testified to by Madden [R. p. 109].

We do not desire to be technical as to whether or not Exhibit BS is in evidence. Appellee contends Exhibit BS is not in evidence. This appellant is not unwilling to have it so; but if on the other hand it is considered that Exhibit BS is in evidence (by reason of the stipulation, the reference to an erroneous original cost figure by the Master and the inclusion of pertinent parts of Exhibit BS in the record before this Court), then the finding of the Master on valuation is equally unsound in law. *Whether the requisite elements are not in the record or do appear in the record, but are given no weight or consideration is of no consequence. In either case reproduction cost new was the only element of value considered.*

In fact the figure found by the Master and adopted by the Court below was identical with the reproduction cost new figure testified to by Madden with certain slight modification. The figure testified to by Madden, reproduction cost new 1921, was $2,859,754, the figure found by the Master for value was $2,600,000 [R. p. 109]. The difference for necessary adjustments is stated by the Master as follows [R. pp. 108, 109]:

> "His" (Madden's) "valuation was $2,859,754 less a depreciation of $128,246 giving a net less depreciation of $2,731,508. From that he further deducted $77,000 to cover errors in his inventory which would bring the valuation to $2,653,508. He also deducted the cost of reproduction of .31 of a mile of storage battery tracks. How much that is in dollars and cents nowhere appears, but if we take the valuation in round numbers at $2,600,000 we shall certainly cover it and whatever other small points of criticism there may be."

The Court below adopted the Master's finding on valuation, in these words [R. p. 119]:

> "The Master found the property to be worth, in round figures, the sum of $2,600,000. This finding, I believe, was justified by the evidence and I shall not disturb it."

It is submitted that no weight or consideration was given to any element other than that of reproduction cost new as of June 30, 1921.

Missouri ex rel. Southwestern Bell Tel. Co. v. *P. S. C.*, 262 U. S. 276.
Bluefield W. W. and I. Co. v. *P. S. C.*, 262 U. S. 679.
Georgia Railway and Power Co. v. *Railroad Commission*, 262 U. S. 265.

It should be noted that the witness Madden testified that he was much opposed to the use of any estimate to reproduce the property new unless it contemplated the reconstruction of that property and that he advocated the use of original cost as a proper basis [R. p. 165]. He testified that he recommended to the Commission that the proper basis for the valuation of the properties including that of appellee was to adopt the valuation on the original cost basis, less the amount necessary to put into first class operating condition [R. p. 160]. We ask the indulgence of the Court to several of Madden's observations on his own reproduction cost new figure.

> "As a matter of fact a car twenty or thirty years old is not being reproduced now."
> "I have not advocated and am not advocating the cost of reproduction theory. That

is a mechanical method of figuring reproduction which does not correspond in my mind with any reality, that is to say I would not reproduce that car today [R. p. 190].

"The cost to reproduce method assumes that the railway is completed over night. The cost to reproduce method assumes that the railroad is non-existent during the period which you adopted your price" [R. p. 199].

"I do not believe in the reproduction cost method for, in accepting that principle, you are applying a theory which would not obtain in practice. If you are to reproduce the property you would not reproduce the property as it exists but you would spend the money to the best advantage taking full advantage of all the advance in the art since the date of original construction and in addition, it is a fluctuating value; your values of today may be very different from your values six months from now" [R. p. 201].

Madden's reproduction cost new figure was subject to the infirmity among other things that as to brokerage fees he stated that he got them from what he considered to be leading brokerage houses; that he had no experience whatsoever in the matter of brokerage fees; that the brokers knew full well the purposes for which he was getting his information [R. p. 199]. Further, Madden himself admitted that the figure he gave, should be reduced by 10%, representing the decline between the date of the appraisal, and the date of his testimony before the Master [R. p. 164]. Such a reduction reflected in the Master's finding of reproduction cost new, would be $260,000.

POINT IV.

It was error for the Master to hold and the Court to adopt a valuation that included property not devoted to rendering service involved in the transfer traffic and also property not used or useful in any service rendered by appellee.

Madden's valuation on each of the bases, to wit, the original cost, reproduction cost 1910-1914, and reproduction cost new as of June 30, 1921, was not made with regard to the property of the 59th Street line, that is to say, the property involved in rendering the service with which this case is exclusively concerned [R. pp. 194, 197, 198, 218]; although he testified that he had the data available to make valuations on the 59th Street line exclusively [R. p. 194].

The 59th Street line operates on 59th Street from First to Tenth Avenues and on Tenth Avenue from 59th Street to 54th Street [R. p. 137]. The valuation by Madden of the Belt Line property, as it appears in the testimony and Exhibit BS, included large amounts of property not involved in the operation of the 59th Street line [R. p. 218]. It covered 7.56 miles of track [R. p. 154] while the 59th Street line covered about 3.14 miles of track [R. p. 153]. Madden's valuation also included 26 storage battery cars [R. p. 209] not used on the 59th Street line.

Madden's appraisal also included the electrical and mechanical equipment in the substation in the 54th Street carbarn (used for the charging of storage battery cars) which are neither used

nor useful in the operation of the 59th Street line [R. p. 183]. Madden's valuation also included all the duct lines on 59th Street from Second Avenue to Tenth Avenue and on Tenth Avenue from 59th Street to 54th Street [R. p. 226] which are jointly used by the appellee and other companies, only a portion of which is devoted to the use of the 59th Street line [R. p. 183].

If it were possible from the record to deduct from the reproduction cost figures of June, 1921, as testified to by Madden, the reproduction cost values of the property erroneously included, a correction could be made to ascertain the proper figures; but there is no proof submitted in the record from which such computations could be made although Madden stated he had the data available [R. p. 194]. The Master apparently conscious of this difficulty attempts to overcome it by a deduction of $54,408, saying:

> "We shall certainly cover it and whatever small points of criticism there may be" [R. p. 109].

The "small points" of criticism are the inclusion of 2.62 miles of storage battery track [R. p. 154], the excess quantity of ducts in 59th Street [R. p. 107], as well as the 26 storage battery cars [R. p. 209] and the electrical and mechanical equipment in the unused substation in the 54th Street carbarn [R. p. 183]. All of these are grouped under the characterization of "small points" of criticism for which an allowance of $54,508 was made by the Master despite the fact that there is no evidence in the record supporting such a computation or any other. The sum of $54,508 was arrived at not by any accurate

calculation, as the figure would seem to indicate, but by striking out the sum mentioned from $2,654,508, to arrive at a round figure [R. p. 109].

POINT V.

The valuation found by the Master and accepted by the District Court was improper because based on the cost to reproduce without any deduction for depreciation; such deduction as was characterized as depreciation was only the cost to put the property in first-class operating condition.

Madden's figure for reproduction cost new as of June 30, 1921, was $2,859,754 [R. p. 157]. The cost to place in first-class operating condition he gave as $128,248 [R. p. 157]. On track and structure and rolling stock alone the accrued depreciation on the straight line basis is $634,818 [Ex. BS, Tables 589,590, opposite page 376; p. 372]. Whether the latter figure be consisdered as being in the record or not, the fact is that it represents depreciation on the basis usually figured as testified to by Madden [R. p. 372], and that no such depreciation was deducted.

The Master in taking Madden's reproduction cost new figure deducted Madden's figure for cost to put in good operating condition to wit $128,246, characterizing it as depreciation [R. pp. 109, 158, 160, 161, 201].

The effect of putting the property in first-class operating condition was recognized by the Master himself as not completely representing depreciation [R. p. 157; statement, *supra,* page 7].

There is no need at this date of entering into a discussion of the law as laid down by this court, relating to depreciation.

> *Knoxville* vs. *Knoxville Water Co.*, 212 U. S. 1, 9, 10;
> *Minnesota Rate Cases*, 230 U. S. 352, 457, 458.

If Exhibit BS be held not in evidence, then the record is barren of any fact showing what the accrued depreciation amounts to on the reproduction cost new basis; accordingly, the Master could not make a proper finding as to that element.

SUMMARY

In addition to the points of Appellant Commission, in which we fully concur, and to the able argument of counsel, in which we are in accord, we respectfully submit that:

1. That the determination of confiscation by the Court below was based upon a finding of an insignificant loss, predicated on conjecture and contrary to the rule requiring proof beyond reasonable doubt.

2. That adopting the Court's finding of loss on the incidental transfer service, the figures show a return of 6.2% on the valuation found by the Master and not disturbed by the Court.

3. That the Master took substantially the reproduction cost new as of June 30, 1921, by Madden as the value of appellee's property, and gave no weight or consideration whatsoever to original cost or any other element.

4. That it was error for the Master to hold and the Court to adopt a valuation that included property not devoted to rendering service involved in the transfer traffic as well as property not used or useful in any service rendered by appellee.

5. That even assuming that a reproduction cost new figure was correct, a proper deduction should have been made for depreciation; the cost to put into good operating condition not being depreciation.

CONCLUSION

The decree appealed from should be reversed, the injunction vacated and the cause remanded with instructions to dismiss plaintiff's bill on the merits with costs in both courts.

Dated, January 31, 1925.

Respectfully submitted,
GEORGE P. NICHOLSON,
Corporation Counsel,
Solicitor for Appellant,
Joab H. Banton, as
District Attorney of the
County of New York.

M. MALDWIN FERTIG,
of Counsel.